IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

LONG CAUSE SUIT NO.237 OF 1978

M/s. Indian Lightgauge Metal
Products Pvt. Ltd., a company
registered under the Companies
Act, 1956 having its registered
office at Bhagwan Mansion,
Cinema Road, Dhobi Talao,
Bombay-1 .. Plaintiffs

Versus

TATA SSL Ltd., a company
registered under the Companies
Act, 1956 having its registered
office at 17 Cooperage Road,
Bombay-39 .. Defendants

Mr. Kamal Bulchandani with Ms. G. D'souza i/b. K.R. Shriram for Plaintiffs
Mr. Chirag Balsara with Mr. N. Engineer and Mr. D.A. Mohta i/b. Desai & Diwanji for Defendants

CORAM : S.R. SATHE,J.

DATED : 11/04/2007

ORAL JUDGEMENT :-

1. Plaintiffs have filed this suit against the defendants for the recovery of the amount of Rs. 17,65,500/- together with interest at the rate of 12% per annum from the date of filing of the suit till realization of the amount in accordance with the particulars of the claim at Exh-M to the plaint, being the amount payable by the defendants as compensation to the Plaintiffs as per clause-3 of the agreement executed between Plaintiffs and defendants on 10/01/1972.

2. The Plaintiff's case in brief is that they have specialized in the process of manufacturing cable armour, flat wires by sizing suitable mild steel wires in their factory, situated at Ghatkopar, Mumbai and for necessary equipment and technical knowhow for the same. The defendants manufacture and supply cable armour flat wire in normal size of 3.99 mm x .72 mm. The defendants were desirous of using the capacity in the Plaintiff's factory for rolling mild steel wires of the defendants

to cable armour flat wires, by defendants supplying the raw materials to the Plaintiffs, Plaintiffs accomplishing the job of flattening the said wires and the defendants paying for the job work at a fixed rate.

3. After negotiations Plaintiffs and defendants entered into an agreement on 10/01/1972. The main terms and conditions of the said agreement are as under :-

> " *(a) that the agreement shall remain in force from 1st April, 1972 for a period of 5 years.*
>
> *(b) that the Defendants would deliver raw materials to the Plaintiffs as per the specifications contained in Annexure 'A' to the said agreement.*
>
> *(c) the Defendants would deliver monthly a minimum quantity of 150 M.T. or 2/3rd of the total quantity of the raw materials rolled in the Plaintiffs' Flattening Mill whichever is less. It is further agreed that if there is any shortfall in the delivery of the raw materials by the Defendants to the Plaintiffs the*

Defendants would compensate at the rate of Rs. 550/- per metric tonne of the short fall.

(d) The Plaintiffs had agreed to deliver the finished products as per the Annexure 'B' of the said contract.

(e) that the Plaintiffs would be paid at the rate of Rs. 550/- per metric tonne.

(f) that the Plaintiffs would pay Rs. 550/- per metric tonne to the Defendants for any shortfall in delivery.

(g) lastly that the Plaintiffs would not undertake or accept materials for flattening cable armour flat wires on their own account and sell it to any other person other than the Defendants. A copy of the said agreement is hereto annexed and marked as Exhibit'A'."

4. By letter dated 15/03/1972, defendants agreed that they would sent a report of their production in their flattening mill and the said report shall be accepted as final and binding by the Plaintiffs. It was

further agreed that if there was any deficit in the supply of raw materials, the defendants have right to cover up the deficit in the next quarter and if excess quantity is supplied it would be adjusting it in succeeding quarter at the option of the defendants.

5. As supply of raw materials by defendants was not regular a meeting was held between Plaintiff and defendant's representative on 27/03/1973. Both of them agreed to condone the delay till that time. It was further agreed that in April-1973 defendants would supply 100 metric tonnes of wire and in May-1973, 125 metric tonnes to Plaintiffs for flattening whereafter the agreed ratio of 2:3 would be strictly maintained. They also agreed that the short fall till February-1973 which was to the extent of 160 metric tonnes would be made up in 6 to 8 months from June-1973 in addition to the agreed 2:3 ratio. The defendants also sent letter dated 07/04/1973 and confirmed the short fall of 160.80 metric tonnes as on February-1973. The Plaintiffs by their letter dated 29/06/1973 informed the defendants that they had not taken into consideration 13.392 metric tonnes being the quantity of round wire rejected

by the Plaintiffs. So, short fall was to the extent of 176.193 metric tonnes. Plaintiffs fond that defendants were not supplying the statement of production as agreed. So, they called upon the defendants to do so.

6. By their letter dated 20/01/1976 Plaintiffs informed the defendants that till August-1975 the deficit in supply of wires was to the tune of 360 metric tonnes. The defendants assured that from September-1975 onwards they would supply regularly minimum quantity of 50 tonnes of wires towards deficit. However, the defendants failed to keep the said assurance.

7. As per the agreement, Plaintiffs were to receive Rs.550/- per metric tonnes for conversion of the round wire into flattening wire. Plaintiffs were entitled to claim from the defendants Rs.550/- per metric tonne during the contract period every month in respect of the short fall in supply of raw materials of the minimum quantity. As per the agreement Plaintiffs were not entitled to take contract from any other company. So, taking into consideration the deficit

supply till August-1975 which was to the tune of 360 metric tonnes as well as the non supply of raw materials at the rate of 150 metric tonnes from September-1975 to March-1977, plaintiff's Advocate issued letter dated 19/02/1977 and called upon the defendants to pay Rs. 550 per metric tonnes for 3210 metric tonnes amounting to Rs.17,65,500/- within 8 days from the receipt of the letter. They also informed the defendants that on defendant's failure to pay the amount they will be required to pay interest at the rate of 18% per annum on the said amount.

8. Inspite of the receipt of the letter, defendants neither paid the amount nor replied the notice. Hence, Plaintiffs filed present suit on 13/02/1978.

9. The defendants filed their written statement and opposed the suit claim on several grounds. They admitted about the execution of agreement dated 10/01/1972 as well as subsequent agreement dated 15/03/1972. According to them, Plaintiffs were aware that the flatten wire required by the defendants were

for the purpose of eventual use in the manufacture of cable by the customers of the defendants. It was therefore a condition of the agreement that the flatten wires would answer the requirement of the defendants and their customers. The defendants also admitted that meeting took place between Plaintiffs and the defendant's representative on 27/03/1973 but contended that in the said meeting defendant's representative Dr. Kashyap had pointed out to the Plaintiffs that the quality of the wire flatten by the Plaintiff was not in accordance with the specifications mentioned in the agreement and that the defendants would reserve their rights to claim damages or expenses incurred by the defendants on account of the said defective quality of the work done by the Plaintiff. According to defendants the Plaintiff's representative promised to improve the quality.

10. The defendants further contended that the alleged rejection of 13.392 metric tonnes raw materials made by the Plaintiff was wrongful. The defendants had carried out their obligations as per the agreement. The Plaintiffs failed to improve the quality of the flatten

wire supplied to the defendants. According to them, each of the consignment sent by the Plaintiffs was tested and it was found that there were several defects in the flatten wires. The said flatten wires were oversized and some times undersized as compared with the specifications. This was so inspite of the fact that defendants gave allowance for permissible process loss in respect of the said flatten wire. The defendants in fact sent various representatives to Plaintiffs pointing out the said defects. According to them, in the meeting dated 02/04/1974 both parties had waived their alleged rights against each other and it was agreed that none of the parties to the agreement would claim anything from other in respect of the alleged short fall or defects mentioned therein.

11. It is the contention of the defendants that as the Plaintiffs failed and neglected to flatten the wire as per specifications, defendants were not bound to supply raw materials as agreed and they were in fact discharged from their duties. The defendants admitted that they received Plaintiff's letter dated 28/11/1976 but denied that there was a deficit in the supply of

wire to the tune of 360 metric tonnes. According to them, it was agreed between them to abandon the agreement dated 10/01/1972 and that none of the parties would claim any damages from others in respect of alleged norms supplied or defective quality. Thus, according to them, both parties by their conduct abandon agreement and as such Plaintiffs are not entitled to claim anything from the defendants. The defendants also denied the Plaintiff's allegation that they could not take any other contract and as a result of the same they suffered loss and were entitled to receive amount of Rs. 550/- per tonne for shortage of 3210 metric tonnes.

12. The defendants also contended that clause-7 of the agreement dated 10/01/1972 is in the nature of penalty and does not contain genuine pre-estimate of any loss on account of any breach of the agreement and as such it is unenforcible. The Plaintiffs denied to run and utilize their equipments for flattening the wires for their own customers and Plaintiff's equipments were not lying idle on account of alleged breach by the defendants. So, according to defendants,

Plaintiffs are not entitled to recover any amount from them.

13. Without prejudice to the above contentions defendants submitted that Plaintiffs failed and neglected to mitigate the alleged loss or damages arising out of the alleged breach and as such the Plaintiffs are precluded from claiming any damages. Thus, according to defendants Plaintiffs did not suffer any damage. They also contended that Plaintiff's suit is barred by law of limitation. Hence on all these grounds, the defendants prayed for the dismissal of the suit.

14. On the above pleadings following issues are framed. I have given my findings as mentioned against the same.

ISSUES	**FINDINGS**
1. Whether or not defendants prove that the Plaintiffs were made aware of the nature/scope/purpose for which the wires were required and if so, does that amount to a condition of the contract ?	Defendants have proved that plaintiffs were aware.

2. Whether the defendants prove that finished products returned by the Plaintiffs were not as per specifications agreed ?	It is not proved that all the goods were defective. At times in few lots there were some defects.
3. Do defendants prove the agreement to waive the rights by the parties as stated in letter dated 27/03/1973?	Not proved
4. Do Plaintiffs prove that defendants committed breach of the agreement dated 10/01/1972 by not supplying 3210 metric tonnes of the raw materials as alleged in paragraph-5 of the plaint ?	Yes
5. Do Plaintiffs prove the quantum of damages of Rs. 17,65,500/-?	Loss caused to Plaintiff was in respect of 66 MT per month from Nov-75 to Mar-77. Plaintiffs are entitled to get Rs. 3.08,550/-.
6. What decree or order ?	As stated in final order

R E A S O N S

15. In order to prove the suit claim Plaintiffs examined their director Ram Gopal Vaid. As against this, on behalf of defendants, they examined M.M.Khilnani, General Manager, Materials of the

defendant's company. Both the parties produced several documents reference to which will be made in further discussion as and when necessary.

ISSUE NO.1

16. It is not in dispute that as per the agreement dated 10/01/1972, the defendants were to provide raw materials to the Plaintiffs and Plaintiffs were to carry out the work regarding flattening of mild steel wires and provide the same to the defendants. Admittedly, subsequent to the agreement dated 10/01/1972 there was another agreement entered into between parties on 15/03/1972. Accordingly, in pursuance of those agreements, business transaction started between Plaintiffs and defendants and Plaintiffs used to supply the goods after carrying out the necessary processing on the raw materials supplied by the defendants. It is the contention of the defendants that there used to be defects in the finished products supplied by the Plaintiffs. Plaintiffs were in fact aware about the nature and purpose for which the wires were required by the

defendants. Even then the flattening wires supplied by the Plaintiff were not serving the purpose for which the defendants had taken the same. Though, it is tried to be shown that Plaintiffs were in fact not aware of the nature/ scope/ purpose for which the wires were required, if we carefully see the evidence on record then it is clear that the Plaintiffs were in fact aware of the nature/scope and purpose for which wires were required by the defendants. If we peruse clauses-5 and 6 of the agreement dated 10/01/1972 (Exh-P2) we find that therein specifications of the product that was to be provided by Plaintiff are mentioned. The same are as under:-

> " *5) The Contractor undertakes to deliver cable armour flats of the sizes mentioned herein below in uniform quantities through each month.*
>
> *6) The Contractor expressly agrees and undertakes to deliver the finished products as per specification given in Annexure 'B'. It is agreed that the process loss due to flattening will not exceed 3% which will be borne by the Principals, whatever material*

may become reclaimable will be returned by the contractor to the principal. "

17. Besides this, if we see the annexture-B of the said agreement dated 10/01/1972 we find that it sets out specifically the width, thickness and radius of the cable armour flat wire which was required to be processed by the Plaintiff. Not only that, but a digram was also annexed to the agreement. Plaintiff's witness Vaid has also clearly admitted that Plaintiffs were aware about the requirement and specifications of the defendants and that the said flattening wire was required by the defendants for being used in the cable industries. Thus, by no stretch of imagination, it can be said that the Plaintiffs were not aware about the nature/ scope/ purpose for which wires were required by the defendants, as it was clearly mentioned in the agreement itself and there was also provision whereby it was stated that process loss should not be more than 3%. So, it must be held that the said specifications/nature and scope were part of the conditions of the contract between Plaintiffs and

Defendants. Hence I have answered issue No.1 accordingly.

ISSUE NO.2

18. In order to show that Plaintiffs have not suffered any loss or damage and on the contrary the defendants had in fact suffered loss and inconvenience the Defendants have taken the contention that the finished products supplied by the Plaintiffs were not as per the specifications agreed. However, it must be stated that the defendants have not adduced cogent and convincing evidence to show that goods supplied by the Plaintiffs were not as per the specifications. It does appear that at some point of time the defendants had made complaint to Plaintiffs that the goods supplied by them are defective. Even if we see the minutes of the meeting that took place between parties on 02/04/1974 therein it is mentioned :-

" M/s. Special Steel Limited (Defendants) have been complaining from time to time about the welding and other defects and Indian Lightgauge Metal (Plaintiffs) will pay more attention to see that these are

eliminated or minimized as much as possible." Admittedly, these minutes are signed by Plaintiffs and defendants. So, it can be said that at times Plaintiffs have also accepted that the goods supplied by them were not perfect and there were some deficiencies. Besides this, defendants have produced on record 4 statements wherein also there is reference about the defects noticed in the good supplied by the Plaintiff. In the said statement, there is specific column showing the total number of coils rejected. Admittedly, this statement was received by the Plaintiff. Plaintiff's witness has admitted such fact. From this statement also it does appear that at times there used to be defective supply from Plaintiff's side and it was noticed by the defendants also. However, attempt has been made on the part of the defendants to show that percentage of defects or deficiency was quite large and even more than 30%. If we carefully peruse the total material supplied by the Plaintiffs to defendants during the period when the business transactions were going on between the parties, we find that the said percentage was not at all very high as contended by defendants. At the same time, it was also not less than

3 % which was in fact permissible as per the contract between parties. So, merely because in some lots some items were found defective one can not jump to the conclusion that all the goods supplied by the Plaintiffs were defective. What is more to be noted is even according to defendants very rarely they have returned the goods supplied by Plaintiffs to them by saying that there are defects in the goods and as such delivery can not be accepted. Incidently, it must be noted that Plaintiff's witness has also admitted that there were some defects in the goods and the same were mentioned in the report. However, such stray admission of the Plaintiff's witness is not sufficient to jump to the conclusion that all the goods or the major portion of the goods supplied by the Plaintiffs to defendants were defective. Hence I have answered issue No.2 accordingly.

ISSUE NO.3

19. It is the contention of the defendants that by letter dated 27/03/1973 parties agreed to waive the rights. However we find that document dated 27/03/1973

is neither agreement nor letter but it is shown as minutes of the meetings. It is mentioned therein :-

" It was agreed between parties that there have been problems both with supplies in expected ratio as well as quality and rejection. The parties have agreed to condone the discrepancy and it is agreed that in April-1973, Special Steel Limited will give 100 MT of wires and in May-1973, 125 MT wires etc." So, there is nothing in this document by which it can be said that parties agreed to waive the rights. On the contrary, subsequent to this document several transactions have taken place between the parties. Not only that but there was exchange of correspondence also. In none of the documents, the defendants had at any time averred that agreement stands waived. Hence, I have answered issue No.3 in the negative.

ISSUE NOS.4,5 AND 6

20. From the averments in the plaint and the submissions made before me one thing is certain that Plaintiffs claim is based on the provisions of section 74 of the Indian Contract Act. It is not in dispute

that in the agreement dated 10/01/1972 executed between Plaintiffs and defendants there was following stipulation :-

> " *3) It is agreed that the Principal shall deliver monthly a minimum quantity either of 150 m. tonnes or for every three tonnes rolled by the Principal in their own flattening mills, two tonnes to the Contractors, whichever is less. Should, however there be any shortfall in the aforesaid allocation of raw materials to be given to the Contractors, the Principal agrees to compensate the Contractor at the rate of Rs. 550/- per tonne.*"

21. It is also an admitted fact that subsequently by virtue of agreement dated 15/03/1972 some amendment was carried out in the earlier agreement whereby parties agreed as under :-

> " If there be any deficit in our despatches of raw materials from the agreed minimum quantity as aforesaid, it is understood that

we have a right to cover up the deficit in the next quarter in which such deficit has occurred. However, if any additional quantity of raw material has been delivered to you than the minimum quantity as aforesaid it is understood that we would have the right to adjust such quantities in the succeeding quarter solely at our option. To make matters further clear it is further understood that if we do not desire to adjust the additional quantity delivered in a particular quarter but deliver the minimum quantity in the next succeeding quarter or additional quantities than agreed to, it will be solely at our discretion. The penalty in clause 3 of the Agreement in respect of allocation of raw materials to you as contractors shall stand amended protanto."

22. It is the case of the Plaintiffs that the defendants failed to supply raw materials of 150 MT per month as agreed and as such they have calculated the

compensation on the basis of the deficit supply at the rate of Rs. 550/- per metric tonnes. The Plaintiffs have given details of the said claim in schedule-M. Thus, according to them, till August-1975 there was deficit supply of 360 MT and from September-1975 till the end of the contract i.e. March-1977. The defendants did not supply any raw material as agreed and thus, committed breach of the agreement in question. The defendants have not disputed that there was stipulations regarding the payment of Rs. 550/- per metric tonnes in respect of deficit supply and subsequently, there was some amendment in the said stipulation by virtue of agreement dated 15/03/1972. Though, the said agreement is in the form of letter. Both the parties have signed the same. So, it has been treated as an agreement.

23. The first contention of the defendants in this behalf is that there was no fault on their part in supplying the raw materials. According to them, the Plaintiffs were in fact not in a position to cope up with the process of flattening wires as contemplated. Their machinery had become old and the Plaintiffs were

not even in a position to process all the raw materials supplied to them in particular month. As a result of the same, there always used to be some balance stock of raw materials with the Plaintiffs. The defendants had no desire and intention to go on dumping the raw materials with the Plaintiffs, particularly when, the earlier raw material supplied to Plaintiffs was not processed within time by them. According to defendants, Plaintiffs own statement goes to show that practically every month there used to be stock in balance. So, under such circumstances merely because the defendants had not supplied the raw materials to the tune of 150 MT per month, the Plaintiffs are not entitled to claim compensation by relying on the clause-3 of the agreement dated 10/01/1972. The defendant's witness M.M. Khilnani, General Manager, Material has produced in his affidavit of evidence one statement Exh-A showing the raw material supplied by defendants in each month, the raw material which was processed and finished products were delivered by the Plaintiffs and the closing balance of the raw material in particular month with the Plaintiffs. The said statement is even admitted by the Plaintiff's witness. Correctness of the

same is not disputed. It is not even suggested to defendant's witness also that contents of the said statement are not correct. If we peruse the said statement then it is crystal clear that during the entire period of 1972 to 1975 not even once the defendants had supplied 150 MT of raw material in a month to Plaintiffs. At the same time, it is equally true that every month there was some closing stock of raw material with Plaintiffs. However, it was argued on behalf of the Plaintiff that when raw material was supplied to the Plaintiffs at the fag end of the month then there was bound to be some opening balance for the next month as during the short period, it was not possible to complete the process of flattening wire in respect of the raw materials supplied by the end of the month. In fact, while considering this aspect one must must see the stipulation No.7 in the agreement dated 10/01/1972. It runs as follows :-

> " *It is expressly agreed by the contractor that in the event of the contractor (plaintiffs) fails to deliver in a particular month a quantity of Cable Armour Flats of the desired size out of round wire*

supplied in the previous month by the Principals less 3% wastage, the contractor shall forthwith pay a penalty of Rs. 550/- (Rupees Five Hundred Fifty Only) in respect of the shortfall in addition to such losses which may include damages to the raw material, insurance, freight charges etc. It is agreed that the contractor shall account for the raw material that is not processed in a particular month, and have it delivered as Cable Armour Flat in the immediate next month in terms of this agreement."

24. So, from this stipulation it is very clear that Plaintiffs were expected to clear off the raw materials supplied to them not in the same month in which raw material is supplied to them but in the next month. So, there is some substance in the justification given by Plaintiff in respect of balance raw material which used to be with Plaintiffs. If we peruse the above mentioned statement we find that practically, in every month the Plaintiffs have delivered the goods clearing

opening stock of that month. In other words, whatever was received in the previous month has been cleared in the next month. It is only on one or two occasions it happened that whatever balance of raw materials was with the Plaintiffs in the beginning of the month has not been cleared off by them even during the entire month. So, under such circumstances one thing is certain that the defendants failed to provide 150 MT of raw materials every month as agreed.

25. If we peruse the minutes of the meeting which took place between Plaintiffs and defendants on 27/03/1973 therein also the defendants have clearly admitted that there was short fall to the extent of 160 MT till end of February-1973. So this also undoubtedly supports the case of the Plaintiffs that there was breach on the part of defendants in supplying the raw materials as agreed. So, there is no substance in the contention raised by the defendants that Plaintiffs are not entitled to claim compensation because there was no breach on their part.

26. A feeble attempt has been made to show that as

the finished products supplied by the Plaintiffs were not as per the specifications of the defendants and the same were of inferior quality, Plaintiffs are not entitled to claim compensation. Earlier it has been also pointed out that the defendants have failed to adduce any sufficient evidence to show that major portion of the finished products supplied by the Plaintiffs was defective. At times, in some lot defective material was exceeding tolerance limit of 3% but that by itself is certainly not sufficient to hold that the defendants were justified in not supplying the quantity of raw materials as agreed. On the contrary, even after the supply of some defective finished products the defendants have made further supply of raw material. So, this also shows that now in order to patch up their fault they are making out false or insufficient excuse.

27. Admittedly, the contract in question was for the period of 5 years i.e. upto April-1977. This is clear from the stipulation No.1 of the said agreement. Even according to defendants after November-1975 they have not made any supply to the Plaintiffs. According

to them, this was because both the parties abandoned the contract. However, besides the bare word of defendant's witness there is absolutely no material on record to substantiate this contention of the defendant. If really the parties had abandoned the contract then certainly when Plaintiff issued letter dated 20/01/1976 Exh-K to the defendant informing them that they have failed to keep their assurance of supplying Plaintiffs minimum 50 tonnes of wire per month towards deficit of the past which was assessed to the tune of 360 tonnes, the defendants would have given some reply to the same. But that has not happened. Not only that, but even after the time Plaintiffs issued notice through advocate to the defendants on 19/02/1977 alleging therein that defendants have committed breach of the agreement and as such liable to pay compensation, the defendants did not give any reply to the said notice. This conduct of the defendants also speaks volumes. If really parties had abandoned the contract as suggested by the defendants then certainly the defendants would have given reply to the above mentioned two communications of the Plaintiffs. But that has not happened. So, under such circumstances, I

am not inclined to accept the contentions of the defendants that the contract in question was abandoned by the parties to the contract.

28. In view of the above discussion I have no hesitation to hold that the defendants have committed breach of an agreement in question. The most important question which falls for consideration in this suit is whether Plaintiffs are entitled to get compensation in respect of the the breach committed by the defendants and if so, to what extent. As Plaintiffs claim is based on the provisions of section 74 of the Indian Contract Act. It would be worthwhile to see what the said section says. It runs as follows :-

> " ***74.*** *Compensation for breach of contract where penalty stipulated for - (When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been*

caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

29. From the bare reading of section-74 of the Indian Contract Act, it is clear that the said section deals with two types of damages which the parties to contract may agree beforehand, as payable in the event of breach. Such a sum may fall under one of the two heads mentioned in section-74. Firstly, it may be a genuine pre-estimate of the loss that will be caused to one party if the contract is broken by the other. Such a pre-estimated amount is called liquidated damages. Secondly, it may be, in the nature of threat held over the other party in terrorem, a security to the promisee that the contract will be performed. A sum of this nature is called a penalty and it has always been subject to equitable consideration. In the instant case, admittedly, there is stipulation that the defendants would pay Rs. 550/- per MT in respect of the deficit supply. According to Shri Bulchandani, learned

advocate for the Plaintiffs, this amount is pre-estimated amount or the amount of liquidated damages agreed between the parties. As against this, Shri Balsara learned Advocate for the defendants submitted that the said amount is not the amount of liquidated damages but it is penalty. It is therefore necessary to decide whether the amount mentioned in the agreement in question can be said to be the amount of liquidated damages or whether it is a penalty.

30. The question whether a particular stipulation in a contractual agreement is in the nature of penalty or not has to be determined by the Court against the background of various relevant factor, such as, character of the transaction and its special nature, if any, relative situation of the parties, the rights and obligations accruing from such a transaction under the general law and the intention of the parties in incorporating in the contract the particular stipulation which is contended to be penal in nature. While considering this aspect, useful reference can be made to a case **BADHAWA SINGH V/S. CHARAN SINGH AIR 1955**

RAJASTHAN 87 wherein the Division Bench of Rajasthan High Court has made following observations.

> "1. Where a sum is named in the agreement as payable on breach thereof, the plaintiff can not be entitled to the entire sum so named 'simpliciter', that is merely because such a sum may be mentioned in the agreement to be so payable.
>
> 2. All that the Plaintiff would be entitled to is a 'reasonable compensation' subject to the amount named therein being maximum.
>
> 3. What is 'reasonable compensation' would depend upon and must be determined by the circumstances of each case.
>
> 4. The aforesaid result must hold good regardless of the consideration that the sum named in the agreement is what under English law is termed 'liquidated damages' or is in nature of a 'penalty'. The effect of the Indian law as embodied in Section 74 is to do away with the distinction between 'penalty' and 'unliquidated damages' under the English law which has been a prolific

force of case-law and which has sometimes given rise to not a little confusion.

5. It must be for the plaintiff to prove the damage suffered by him, but such proof may be direct or circumstantial, and need not possess the quality of arithemtical exactitude.

6. If the plaintiff succeeds in establishing that the sum named in the agreement is a genuine pre-estimate of damages, or would otherwise be a reasonable compensation for the breach, the Court may grant the entire sum named in the breach as such compensation. If, on the other hand, the Court comes to the conclusion that the amount as fixed was in terrorem or unconscionable and extravagant, it would be open to it to award such sum as may appear to be reasonable.

7. In deciding whether the amount fixed is a genuine pre-estimate or reasonable compensation or not, it would be a factor for consideration whether the sum named in

> the agreement is not disproportionate to the injury caused and whether the burden evenly and equitably falls on both parties to the contract."

31. Bearing in mind the above legal position let us scan the evidence on record and find out whether the amount of Rs. 550/- per MT provided for deficit supply is by way of liquidated damages or by way of penalty. If we peruse the agreement dated 10/01/1972, we find that there is no mention of the word Penalty in the said agreement. On the contrary, it is mentioned that principal agrees to compensate at the rate of Rs. 550/. However, admittedly, the said agreement has been amended on 15/03/1972 wherein it is clearly mentioned "the penalty provided in the clause-3 of the agreement in respect of allocation of raw materials to you as contractors shall stand amended protanto" Thus, we find that by virtue of use of word penalty the parties have in fact removed the ambiguity if any in respect of the nature of the said amount. Taking into consideration this position the learned Advocate for the defendants has drawn my attention to the following observations

made by the Apex Court in the case of **ONGS V/S. SAW PIPES reported in (2003) 5 SSC 705**.

> "39. Mr. Desai referred to the decision rendered by this Court in Delta International Ltd. V. Shyam Sundar Ganeriwalla (1999) 4 SCC 545 and submitted that for the purpose of construction of contracts, the intention of the parties is to be gathered from the words they have used and there is no intention independent of that meaning.
>
> 40. It can not be disputed that for construction of the contract, it is settled law that the intention of the parties is to be gathered from the words used in the Agreement. If words are unambiguous and are used after full understanding of their meaning by experts, it would be difficult to gather their intention different from the language used in the agreement."

32. Taking into consideration the above observations and finding that parties had particularly used the word penalty in the agreement dated 15/03/1972, I have no hesitation to hold that the amount mentioned in the agreement is by way of penalty.

33. Even if we apply the other tests which are mentioned earlier to determine as to whether the amount is by way of liquidated damages or by penalty, it appears that the amount mentioned in the instant agreement is by way of penalty. The first and for most point is that as per the agreement charges that are required to be paid by the defendants to Plaintiffs for their job of flattening the wire are also Rs. 550/- per tonne. Not only that but there is also the clause which says that if plaintiffs commit breach in suppling the finished products as agreed they would also be liable to pay at the rate of Rs. 550/- per metric tonnes. If the charges for carrying out the work of flattening the wire were Rs. 550/- per metric tonne then normally the damages or compensation for breach must be something less than Rs. 550/- per metric tonne. This is obviously because when Plaintiffs are charging particular amount

for their job, the said amount is determined after taking into consideration their cost of preparing finished products which clearly include the cost of labour, electricity charges, depreciation of machinery, establishment charges and profit. So, the very fact that even in a case of breach, parties have been directed to pay amount at the rate of Rs. 550/- per metric tonne shows that the said amount can not be said to be genuine pre-estimated amount or liquidated damages. So, I have no hesitation to hold that in the instant case amount of Rs. 550/- is by way of penalty.

34. Shri Balsara, learned Advocate for the defendant strenuously argued before me that in the instant case the Plaintiffs have not adduced any evidence to show that they suffered particular loss or that actual damage has been caused to them as a result of non supply of the raw materials to them. According to him, even when the case falls under section 74 of the Indian Contract Act, it is necessary for the Plaintiff to adduce specific evidence regarding the actual damage or loss caused to the Plaintiffs and if such evidence is not adduced then Plaintiff's suit is

liable to be dismissed. In order to substantiate this, he has placed reliance on various decisions of the Apex Court such as **ONGC V/S. SAW PIPES (2003) 5 SCC 705**, **MAULA BUX V/S. UNION OF INDIA 1969 (2) SCC 554 AND FATEH CHAND V/S. BALKISHAN DAS 1964 (1) SCR 527**.

35. I have carefully gone through the above cited rulings. However, facts of the said cases and facts of the case in hand are different. In the case of Fatehchand V/s. Balkishandas, the Apex Court was considering whether section-74 applied to stipulation for forfeiture. In Mulabux V/s. Union of India, there was question with regard to liquidated damages and penalty. In ONGC V/S. SAW PIPE also there was not question of consideration of penalty clause. While in the instant case, we are mainly concerned with the application of section-74 when the amount mentioned in the agreement is by way of penalty. So, facts of the above mentioned three cases and facts of the case in hand are quite different. Besides this, ratio of above mentioned three cases is not as tried to be suggested by the learned advocate for the defendants. What is the

ratio of Fatehchand's case is stated by the Apex Court itself in subsequent case of ONGC V/s. Saw Pipe Ltd. wherein the Apex Court has observed.

" In Fatehchand's case wherein it is specifically held that jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. Under section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasis that in case of breach of contract, the party complaining of

the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach.

36. Similarly, what is the ratio of Maulabux's case is also stated by the Apex Court in the subsequent case of ONGC case. The Apex Court has observed :-

"In Maulbux case the Court has specifically held that it is true that in every case of breach of contract the person moved by the breach is not required to prove actual loss or damage suffered from him before he can claim the decree and the Court is competent to award reasonable compensation in case of breach. Even if no actual damage is proved to have been suffered in consequence of breach of contract. The Court has also specifically held that in case of breach of some contract it may be impossible for the Court to assess compensation arising from breach"

37. Moreover, I do not think that the ratio of the above cited rulings is that in a case which falls under section 74 of the Indian Contract Act, the Court has no power to grant reasonable amount of penalty when

Plaintiff has not adduced specific evidence about the actual loss or damage sustained by him. It is pertinent to note that there is difference between the amount of compensation or damages claimed under section 73 of the Indian Contract Act and damages claimed under section 74 of the Indian Contract Act. Section 74 speaks about the amount to be granted to Plaintiff when the agreement itself provides specific amount liable to be paid by the party committing breach. So, the object of that section is that once parties have agreed between themselves that the contract would be performed in particular manner then one who commits breach of the said contract must pay the amount to the other side. The very fact that the said section clearly says. " The parties complaining of the breach is entitled whether or not actual damages or loss is proved to have been caused thereby to receive from the parties who have broken the contract." certainly indicates that the amount is liable to be paid even if no loss is caused. When it is said that the party is not under an obligation to prove actual damage or loss that obviously means that whether loss is caused or not is immaterial and the party committing breach has to pay.

The only rider put in the said section is merely because particular amount is quantified in the contract, the Court is not bound to pay compensation or damage at the same rate but duty is cast upon the Court to see whether the amount quantified in the agreement whether by way of liquidated damages or penalty is reasonable or not and while doing so further restriction is placed that the said reasonable amount shall not exceed the amount named in the agreement. So under such circumstances, I am of the view that even if Plaintiff has not adduced any specific evidence to show the actual loss or damage caused to him still the Court can direct the defendant to pay the reasonable compensation by way of penalty to the Plaintiffs as the defendants committed breach of their promise for their agreement. Once the defendants have committed breach of the promise they had given, they can not be allowed to go free without incurring any penalty for the said breach. In my opinion, if in a case which clearly falls under section 74 of the Indian Contract Act one says that Plaintiffs claim must fail because he has not proved as to how he suffered loss then it would in fact amount to negating or ignoring the words " the party

complaining of the breach is entitled whether or not actual damages or loss is proved to have been caused thereby". So, Court can not certainly interpret the section in such fashion. It appears to me that in order to maintain the sanctity, importance and value of promise given by one party to other. This provision of section 74 has been made. In support of this proposition useful reference can be made to case **N. Hardip Singh V/s. M/s. Hira Films and Ors. AIR 1960 PUNJAB 637** relied upon by the learned Advocate for the Plaintiff in this case. The Division Bench of Punjab and Haryana High Court has observed :-

> "*Section 74 relates to contracts wherein on breach thereof liability to pay a specified amount as damages is mentioned or there is a stipulation by way of penalty. The section lays down that the person entitled to get damages is to receive reasonable compensation not exceeding the amount specified in the contract. What is reasonable compensation in a given case depends on the facts and*

circumstances of each case and to determine it a Court must take into consideration the entire material on the record and also consider the circumstances of the case. This section does not make any distinction between the amount mentioned in the contract as liquidated damages based on genuine pre-estimate or as a security for due performance thereof. In either case it is incumbent on Courts of law to compute reasonable compensation and it is not for the parties concerned to determine the figure. If the amount of reasonable compensation exceeds the amount mentioned in the contract then the amount so mentioned therein must be treated as reasonable.

In all cases covered by S.74 the amount is to be decreed as reasonable compensation and not by virtue of its mention in the contract. It is obviously for the party claiming compensation to bring the necessary material on the

record. Section 74 lays down that it is the duty of Court to award reasonable compensation even when the aggrieved party has turned to prove that it had suffered any actual damage or loss. In such a case the Courts will award nominal or in flagrant cases even substantial compensation. It, therefore, follows that in substance the only effect of naming a sum as compensation in a contract is that the decree in no case to exceed that amount which operates as a maximum in the case." emphasis is mine.

So, taking into consideration the above mentioned position of law, I think that it is essential in the instant case to direct the defendants to pay some amount to the Plaintiffs.

38. Before proceeding to determine the amount of compensation that defendant has to pay, it is necessary to consider another legal point that has been raised by the learned Advocate for the Defendants. It was argued

on behalf of the defendants that the Plaintiffs in the instant case kept mum for a period of about one year though raw material was not supplied to them. According to defendants, during that period the Plaintiffs could have undertaken contract of some other firm so as to minimize their loss, so that their machinery and labour would not have remained idle. However, the Plaintiffs have not done anything to mitigate the loss and as such Plaintiffs are not entitled to claim compensation. Firstly, it must be noted that from time to time, the Plaintiffs used to inform the defendants to supply raw material as per the agreement. Record shows that some times even after laps of 2-3 months, the defendants made supply. So, under such circumstances, it is in fact not proved that plaintiffs had not taken any steps to inform the defendants to supply raw materials or that they kept mum for a continuous period of about one year. What is more to be noted is that as per the terms of the Contract a restriction was put on the Plaintiffs that during the period of contract, which was of 5 years, Plaintiffs should not undertake contract of processing of wires from any other firm, means they should only work for the defendants. When such was the

condition, if the Plaintiffs had not taken any other job from other firm or company, they can not be blamed. If they had taken work from other company then again the defendants would have said that Plaintiffs have committed breach of the agreement. So, there is no substance in the argument advanced by the learned Advocate for the defendants in this behalf.

39. It must also be noted that it is well settled that the principle of mitigation of loss does not give any right to the party who is in breach of the contract. But it is a concept that has to be borne in mind by the Court while awarding damages. It has been so held in **M. Lachia Shetty V/s. Coffee Board,Banglore, AIR 1981 Supreme Court 162**. The Principle of mitigating loss only requires that the Plaintiff should act reasonably. Plaintiff is under no obligation to destroy his own property or to injure himself or his commercial reputation to reduce the damage payable by the defendant. Having regard to facts and circumstances of the case by no stretch of imagination it can be said that in the instant case Plaintiffs did not act

reasonably. In fact here defendants have committed breach of agreement by not supplying the agreed quantity of raw material. So, I am not inclined to hold that the present Plaintiffs failed in their duty to mitigate the loss and as such they are not entitled to claim compensation.

40. As mentioned earlier it is very clear that amount of Rs. 550/- named in the agreement is a penalty. It is also clear that when the charges for processing were also Rs. 550/- per tonne then in any event it can not said that the loss caused to the Plaintiff as a result of breach committed by the defendants was also at the rate of 550/- per tonne. So, the amount which is named is certainly unreasonable. Having regard to the provisions of section 74 of the Contract Act, it is necessary to fix the reasonable amount which may be either by way of liquidated damages or by way of penalty. It is needless to say that even the amount of penalty must be proportionate to the fault committed by the defendants.

41. The question arises on what basis the

reasonable amount is to be determined. Obviously, it can not be arbitrary. There should be some basis some logic behind it. It is true that the present Plaintiffs have not specifically stated anywhere that the particular amount be treated as reasonable amount. Nor they have adduced specific evidence showing as to what was their profit per tonne when they were charging Rs. 550/- per tonne for the processing. Considering the process involved and the fact that Plaintiffs must be spending some amount for the electricity, labour, maintenance of machinery, establishment charges etc., one can safely hold that 50% of the amount of Rs. 550/- would be reasonable amount of compensation or penalty per tonne. As defendants have totally failed to supply the material after November-1975 till March-1977, the plaintiffs did not get any charges for that period which means they were put to loss. Hence, plaintiffs are certainly entitled to get compensation for the said amount. So, on the basis of these admitted facts, one can determine the reasonable amount of compensation. Certainly this is not a case where the Court has no material to determine the reasonable amount of compensation or penalty.

42. While considering this aspect, it must be noted that though the agreement was to supply minimum 150 per tonnes per month, from the admitted facts it is very clearly that for a period of more than two and half years at no point of time the defendants had supplied 150 tonnes of raw material in one single month. Average quantity of raw material supplied during that period is only about 66 tonnes. This is evident from the statement provided in defendants evidence. Plaintiffs during all that period never claimed any compensation for the balance or deficit supply. So, one can reasonably hold that even having such deficit supply Plaintiff was not put to loss or he did not bother to claim damages immediately for that. However, after November-1975 the defendants did not make any supply. So, I am inclined to grant compensation or amount by way of penalty only in respect of the said period and that would be at the rate of Rs. 225/- per tonne. So, during the period of about 17 months at the average of 66 tonnes per month defendants should have delivered 1122 tonnes raw material. So, at the rate of Rs.275 Plaintiffs would have received profit of about Rs. 3,08,550/- but as the said amount is not received by

the Plaintiffs they have been put to loss to that effect. So, I am inclined to hold that reasonable amount of penalty that defendants are liable to Plaintiffs is to the tune of Rs. 3,08,550/-. Though Plaintiffs had mentioned in notice that if amount claimed by them in notice is not paid by defendants they would be liable to pay interest at the rate of 18%, actually in plaint they claimed interest at the rate of 12%. In evidence, Plaintiff's witness has not stated anything about rate of interest. So having regard to provisions of section 34 of the Code of Civil Procedure, I am inclined to grant interest at the rate of Rs. 6%. Hence I pass the following order :-

O R D E R

1. Suit is partly decreed.

2. The defendants to pay plaintiffs Rs. 3,08,550/- and interest on the said amount at the rate of Rs. 6% per annum from the date of the suit till realization of the amount.

3. The defendants to pay Plaintiffs the proportionate costs of this suit and bare their own.

(S.R. SATHE,J.)